

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Richard and Maria Shupe,

Plaintiffs,

vs.

Bank of America, National Association,

Defendant.

CV 13-019-TUC-JR

REPORT & RECOMMENDATION

Pending before the Court is Plaintiffs Richard and Maria Shupe's Motion to Amend Complaint (Doc. 80). Defendant Bank of America, National Association ("BANA") filed a response (Doc. 91). The Plaintiffs did not reply. As the decision on this motion is dispositive to the claims the Plaintiffs propose to add by amendment, the motion will be addressed by Report and Recommendation. For the reasons explained below, the Magistrate Judge recommends that the District Court, after conducting an independent review of the record, deny the motion.

1 **I. Background**

2 The Court's jurisdiction over this action arises from the Telephone Consumer
3 Protection Act ("TCPA"), 47 U.S.C. § 227. *See Mims v. Arrow Financial Services,*
4 *LLC*, -- U.S. --, 132 S.Ct. 740 (2012). In the original complaint, in addition to claims
5 made under the TCPA, the Plaintiffs alleged claims for invasion of privacy,
6 harassment, intentional infliction of emotional and physical distress, and claimed that
7 the Defendant violated A.R.S. § 44-1282, which prohibits certain intrastate
8 telemarketing solicitations (Doc. 1). The complaint specifically alleged that the
9 Defendant ignored the Plaintiffs' notices not to call their residential telephone
10 number by using predictive dialing systems to call them on more than 50 occasions.

11 On March 4, 2013, the Plaintiffs filed a notice that they were withdrawing
12 their claims for harassment and intentional infliction of emotional and physical
13 distress (Doc. 19).

14 In its entirety, the motion to amend now before the Court states:

15 Come now the Plaintiffs in the above entitled action and seek leave of
16 the court to amend their complaint. The Plaintiffs amended complaint
differs in that it adds the claim of Negligence; revised content of
17 complaint; and changes the prayer for relief.

18 *Motion*, p. 1. However, the lodged proposed Amended Complaint (Doc. 81) includes
19 not only a new claim of negligence and an amended prayer for relief, but also alleges
20 the previously withdrawn claim for harassment.

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II. Discussion

Pursuant to Fed. R. Civ. P. 15(a)(2), when it does not qualify to amend a pleading as a matter of course, “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” “Five factors are taken into account to assess the propriety of a motion for leave to amend: bad faith, undue delay, prejudice to the opposing party, futility of amendment, and whether the plaintiff has previously amended the complaint.” *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004). “Not all of the factors merit equal weight. As this circuit and others have held, it is the consideration of prejudice to the opposing party that carries the greatest weight.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

Three of the five factors to be considered require little analysis. The Plaintiffs have not previously amended the complaint and the Defendant does not argue that the Plaintiffs are acting in bad faith or that the proposed amendment is futile. Thus, those three factors support the proposed amendment. However, the Court agrees with the Defendants that the remaining factors, undue delay and prejudice, require denial of leave to amend.

A. Undue Delay

“Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.” *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990) (citations omitted). Here, the Plaintiffs have offered nothing to support a finding that the

1 proposed amendments are based on facts or theories that were previously unknown.
2 As quoted above, the motion merely requests leave to amend and notes the proposed
3 additions. The Plaintiffs do not indicate what motivated them to now seek to add the
4 claim of negligence. Moreover, as the Defendant points out, the Plaintiffs agreed that
5 any proposed amendments to the complaint would be submitted by July 30, 2013
6 (Doc. 23). More than nine months have passed since that agreed upon deadline, and
7 the Plaintiffs have offered no explanation for their delay. As such, this factor
8 supports denial of the motion for leave to amend.

9 **B. Prejudice**

10 The Ninth Circuit has held that prejudice may effectively be established by
11 demonstrating that a motion to amend was made after the cutoff date for such
12 motions, or when discovery had closed or was about to close. *See, e.g., Zivkovic v.*
13 *Southern Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (affirming denial of
14 plaintiff's motion for leave to amend where proposed amendment would have added
15 additional causes of action which would have required further discovery and
16 discovery was set to close five days after motion to amend was filed); *Solomon v.*
17 *North Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998) (affirming the
18 denial of leave to amend where the motion was made "on the eve of the discovery
19 deadline" and "[a]llowing the motion would have required re-opening discovery, thus
20 delaying the proceedings").

21 After a number of extensions, the parties in this action are less than one month
22 from the discovery deadline and the Defendant has conducted the depositions of the

1 Plaintiffs. Allowing for an unexplained and unjustified amendment of the complaint
2 at this juncture would likely require another extension of the discovery deadline,
3 duplicate discovery efforts and further delay an already much-delayed case. The
4 prejudice the Defendant would face at this late stage of the case from having to
5 conduct discovery on a new claim and on a claim that was previously withdrawn
6 weigh heavily against granting leave. This consideration, particularly when coupled
7 with the Plaintiffs' unexplained delay, supports the denial of the motion.

8 **III. Recommendation**

9 Based on the foregoing, the Magistrate Judge **recommends** that the District
10 Court, after its independent review, **deny** Plaintiffs Richard and Maria Shupe's
11 Motion to Amend Complaint (Doc. 80).

12 The parties shall have 14 days from the date of service of a copy of this
13 recommendation within which to file specific written objections with the District
14 Court. See 28 U.S.C. § 636(b)(1) and Rules 72(b), 6(a) and 6(e) of the Federal Rules
15 of Civil Procedure. Thereafter, the parties have 14 days within which to file a
16 response to the objections. Replies shall not be filed without first obtaining leave to
17 do so from the District Court. If any objections are filed, this action should be
18 designated case number: CV 13-019-TUC-JGZ. Failure to timely file objections to
19 any factual or legal determination of the Magistrate Judge may be considered a

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1 waiver of a party's right to de novo consideration of the issues. *See United States v.*
2 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

3 Dated this 15th day of May, 2014.

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7 Jacqueline M. Rateau
United States Magistrate Judge
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